

IT 00-16

Tax Type: Income Tax

Issue: Responsible Corporate Officer – Failure to File or Pay Tax

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS**

THE DEPARTMENT OF REVENUE)	Docket No.
OF THE STATE OF ILLINOIS)	NOD Nos.
v.)	Tax ID Nos.
JANE DOE &)	
MARY ROE , as responsible)	FEIN:
officers of ABC Electrical Contractors, Inc.,)	John E. White
Taxpayers)	Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: Donald Bettenhausen, Bettenhausen & Jarman, Ltd., appeared for JANE DOE and MARY ROE; Rickey Walton, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

Synopsis:

This matter arose after JANE DOE (“DOE”) and MARY ROE (“ROE”) protested the Notice of Deficiency (“NOD”) the Illinois Department of Revenue (“Department”) issued to each of them. Each NOD proposed to assess a deficiency that was equal to the unpaid Illinois income tax that had been withheld from the wages paid to the employees of ABC Electrical Contractors, Inc. during the first and fourth quarters of 1995 and during all quarters of 1996.

At hearing, taxpayers and the Department stipulated to the admission of several documents. Both taxpayers testified, as did JOHN DOE, who is DOE’s husband and ROE’s father. I am including in this recommendation findings of fact and conclusions of law. I recommend that the NOD issued to DOE be cancelled and the NOD issued to ROE be finalized as revised, pursuant to statute.

Findings of Fact:

1. ABC Electric Contractors, Inc. (“ABC”) was owned and managed by JOHN DOE (“JOHN”). Hearing Transcript (“Tr.”) p. 19 (JOHN).
2. During the years at issue, JOHN was a union electrician. Tr. p. 26. (JOHN). Because of union rules, JOHN’s wife, DOE, was made president of ABC, and his daughter ROE, was secretary. Department Exs. 6-7; Tr. pp. 26-27 (JOHN), 42-43 (DOE), 58-60 (ROE); *see also* Department Ex. 7 (ROE’s maiden name is DOE).
3. Both DOE and ROE knew that they were named and held out as ABC’s officers, and why. Department Ex. 12 (ROE’s response to the Department’s First Set of Interrogatories), p. 1 (interrogatory number 1, “I was an employee, Director and Secretary of [ABC].”); Tr. pp. 42-43 (DOE), 58-60 (ROE).
4. JOHN was identified as a ABC president/director on two unsigned copies of ABC’s annual report forms for 1994 and 1995. Department Ex. 7.
5. JOHN hired and fired ABC’s employees. Tr. p. 23 (JOHN).
6. DOE and ROE were employees of ABC during the period at issue. Tr. pp. 40 (DOE), 56 (ROE).
7. DOE was employed part time, and her duties were described as cleaning up ABC’s offices and, apparently without JOHN’s knowledge, answering ABC’s phones. *See* Tr. pp. 20-21 (JOHN), 40 (DOE).
8. DOE signed none of the Illinois withholding tax returns filed during the period at issue. *See* Department Ex. 4.
9. ROE was employed full time as ABC’s office manager during the period at issue. *See* Tr. pp. 56-74 (ROE); *see also*, Department Ex. 4, p. 1.
10. ROE’s duties included, *inter alia*:

- performing general office clerical duties. Tr. p. 58.
 - preparing ABC's checks on a computer and mailing them after they were signed. Department Ex. 12, p. 4; Tr. p. 68.
 - writing letters and preparing invoices. Tr. p. 63.
 - preparing ABC's payroll and payroll checks. Tr. pp. 64, 68.
 - mailing out ABC's invoices, checks and correspondence. Department Ex. 12, p. 4; Tr. pp. 68-69.
11. ROE reported to her father, and worked under his control and supervision. *See* Tr. pp. 66-75 (ROE).
 12. ROE signed court documents initiating ABC's bankruptcy. Tr. p. 58 (ROE).
 13. SUZIE, ABC's accountant, prepared ABC's Illinois 941 forms, i.e., its Illinois quarterly withholding tax returns, during the periods at issue. Tr. p. 71; *see also* Department Ex. 4.
 14. ROE signed one of ABC's withholding tax returns filed during the period at issue, on which she used her title of office manager. Department Ex. 4, p. 1; *see also* Tr. p. 74 (ROE).
 15. JOHN signed the other Illinois withholding tax returns ABC filed during the period at issue. Department Ex. 4.
 16. No documentary evidence was offered to show who signed the returns ABC filed during periods other than the periods at issue, although JOHN testified that he signed them. Tr. p. 35 (JOHN). Similarly, no documentary evidence was offered to show who signed the ABC checks that were used to pay ABC's prior Illinois withholding liabilities, although JOHN testified that he was the only person allowed to sign ABC's checks. *Id.*
 17. Both DOE and ROE alleged that they were not signatories on any of ABC's bank accounts, but no corroborative documentary evidence was introduced to support

that testimony. Tr. pp. 43 (DOE), 64 (ROE).

Conclusions of Law:

Section 1002(d) provides:

Willful failure to collect and pay over tax. Any person required to collect, truthfully account for, and pay over the tax imposed by this Act who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable for the penalty imposed by Section 3-7 of the Uniform Penalty and Interest Act.

35 **ILCS** 5/1002(d). When the Department introduced the NODs into evidence under the certificate of the Director, it presented *prima facie* proof that DOE and ROE were personally responsible for ABC's unpaid withholding tax liabilities. 35 **ILCS** 735/3-7; Branson v. Department of Revenue, 68 Ill. 2d 247, 260, 659 N.E.2d 961, 968 (1995). The Department's *prima facie* case is a rebuttable presumption. *Id.* at 262, 659 N.E.2d at 968.

After the Department introduces its *prima facie* case, the burden shifts to the taxpayer to establish that one or more of the elements required for the imposition of the penalty are lacking. Raleigh v. Illinois Department of Revenue, 120 S.Ct. 1951, 1954 (2000); Branson, 168 Ill. 2d at 261-62, 659 N.E.2d at 968-69. A taxpayer cannot overcome the Department's *prima facie* case by merely denying the accuracy of Department's assessment, or by merely denying conscious awareness that the tax was due by the corporation. Branson, 168 Ill. 2d at 267, 659 N.E.2d at 971. Instead, the taxpayer must present evidence that is consistent, probable, and closely identified with its books and records. A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 833-34, 527 N.E.2d 1048, 1053 (1st Dist. 1988); Balla v. Department of Revenue, 96 Ill. App. 3d

293, 296-97, 421 N.E.2d 236, 239 (1st Dist. 1981).

One attorney represented both taxpayers, and he made similar arguments for both of them. Fundamentally, taxpayers' joint defense to the NODs is that JOHN was the person who was "required to collect, truthfully account for, and pay over the tax imposed by [the IITA]", and that they were not. Since JOHN was the responsible person, their argument continues, neither of them could have been a person who "willfully fail[ed] to collect such tax or truthfully account for and pay over such tax or willfully attempt[ed] in any manner to evade or defeat the tax or the payment thereof" *See* Tr. p. 79 (closing argument). Specifically, JOHN testified that DOE and ROE were "listed ... [as officers] ... for the sole purpose of maintaining [his] union benefits [and that they had] ... no control or supervision or authority over the company" Tr. p. 27 (JOHN).

In response, the Department countered that mere testimony is insufficient to rebut the Department's *prima facie* case. Tr. pp. 80-81. The hearing testimony concerning DOE, however, was corroborated by documentary evidence the Department offered into evidence during its case in chief. *See* Department Ex. 4. The Department introduced the returns ABC filed regarding the periods at issue at hearing, and none of them were signed by DOE. *Id.* Instead, JOHN signed all but one, and ROE, not DOE, signed the odd one. *Id.*

Those documents, therefore, corroborate DOE's testimony (as well as ROE's and JOHN's testimonies) that someone other than DOE was responsible for filing ABC's quarterly withholding returns and paying the taxes shown due on those returns. They also offer some documentary evidence, closely identified with ABC's books and records, to corroborate DOE's fundamental claim that she was not a person who was "... required

to collect, truthfully account for, and pay over the tax imposed by [the IITA]”, on ABC’s behalf. 35 **ILCS** 5/1002(d).

Further, DOE’s testimony was credible. She testified that JOHN did not and would not specifically discuss ABC’s financial matters with her. Tr. p. 53 (DOE). Her testimony showed that, generally, her interactions with ABC consisted of her acquiescing to the instructions of her husband regarding the business. Even with regard to the transactions for which she was required to act, for example, when she signed an application for a letter of credit the collateral for which was real estate owned jointly by JOHN and DOE, none of those appear to have had any relation to the filing of ABC’s tax returns, or its payment of taxes. *See* Department Ex. 11, p. 2 (DOE’s response to interrogatory number 6); Tr. pp. 54-55 (DOE). Her lack of control and authority over ABC’s operations is further corroborated her part time employment status, and with her concomitant salary and low level duties. *See* Department Ex. 11, pp. 3-4 (DOE’s responses to Department interrogatory numbers 9, 12); Tr. p. 40 (DOE).

I conclude, therefore, that DOE rebutted the statutory presumption that she was liable for the penalty issued against her. Thereafter, the burden shifted to the Department to prove its case by a preponderance of competent evidence. The only competent evidence the Department introduced showed that DOE was a president and a part-time employee of ABC, and that she co-signed a letter of credit ABC obtained from a bank. *See* Department Exs. 6-7; Department Ex. 11, p. 2; Tr. p. 50 (DOE). Without benefit of the statutory presumption of correctness, however, those facts do not show, by a preponderance of the evidence, that DOE was a “person required to collect, truthfully account for, and pay over the tax imposed by ... [the IITA and] who willfully fail[ed] to

collect such tax or truthfully account for and pay over such tax or willfully attempt[ed] in any manner to evade or defeat the tax or the payment thereof” 35 ILCS 5/1002(d).

On the other hand, the record shows that ROE had more knowledge of and responsibilities regarding ABC’s day to day operations than DOE. ROE was a full-time ABC employee, and her salary ranged from almost double to triple her mother’s. *See* Department Exs. 11-12, p. 4 of each exhibit (taxpayers’ responses to interrogatory number 12); Taxpayer Ex. 1, pp. 2-3 (ROE’s W-2 forms from ABC for 1995-1996), 4-5 (DOE’s W-2 forms from ABC for 1995-1996).

Consistent with that greater degree of knowledge about ABC’s business, the evidence shows that ROE had more responsibilities regarding ABC’s operations. ROE completed ABC’s timekeeping and payroll. Tr. pp. 58, 64 (ROE). She prepared the payroll checks and gave them to her father to sign. Department Ex. 12, p. 4. She prepared invoices using timesheets and material invoices. Tr. p. 63 (ROE). She knew of ABC’s obligation to make withholding payments (Department Ex. 12, p. 3 (response to interrogatory number 9), that Greico prepared ABC’s Illinois withholding returns (*id.*), and she knew that ABC’s computer automatically printed a federal withholding tax return. Tr. p. 71 (ROE). ROE testified that she prepared ABC’s other checks, then gave them to her father to sign, and that she mailed the checks and invoices that she prepared and which he signed and/or approved. Tr. pp. 64, 66-69 (ROE). She knew that a check was not automatically prepared for ABC’s Illinois withholding payments. Tr. p. 72 (ROE). Someone, therefore, would have had to prepare those checks.

ROE’s own testimony was that she had the authority to prepare different types of ABC’s checks, yet she claimed that she could not recall whether she ever prepared a

check to pay the amount of ABC's Illinois withholding tax. Tr. p. 72 (ROE). In her answers to the Department's interrogatories, however, she stated that she had "... authority to prepare checks as instructed by Mr. JOHN DOE, to pay payroll, tax deposits, loans and other creditors." Department Ex. 12, p. 4. Thus, I conclude that ROE had the authority to prepare checks for ABC's Illinois withholding payments. *Id.* JOHN testified, however, that during most of the period at issue, ABC was only paying its employees. *See* Tr. p. 32 (JOHN). The record confirms that ABC was not including checks with its Illinois withholding returns during the applicable period. *See* Department Ex. 5.

Nor do I believe ROE's testimony that she lacked the authority to sign ABC's Illinois withholding tax returns. *See* Tr. p. 73 (ROE). ROE, in fact, signed one of the returns ABC filed during the period at issue. Department Ex. 4, p. 1. ROE did not deny that it was her signature that was affixed to ABC's withholding tax return for the second quarter of 1995, or that she signed it on 7/28/95. Tr. p. 74. Instead, she testified that she could not recall signing that particular return, and that, if she did, she must have signed it because her father told her to. Tr. pp. 73-74. I distrust ROE's repeated claimed inability to recall her own actions regarding events that might be considered consistent with culpability (*see* Tr. pp. 72-74), when she was perfectly able to recall and testify about contemporaneous events that might be considered consistent with her claim that she lacked responsibility for filing ABC's Illinois withholding returns or for signing ABC's checks to pay the tax shown due on those returns. *See, e.g.,* Tr. pp. 69 (ROE, testifying that JOHN had "absolute control over what [she] did and didn't do"), 72 (testifying that she didn't have the authority to generate a check for payment of ABC's federal withholding return, which check was auJOHNatically generated with payroll checks as

part of ABC's payroll program), 73 (testifying that someone else, and not she, prepared ABC's Illinois withholding returns). Such selective memory weakens ROE's overall credibility. *See* Michael H. Graham, Cleary & Graham's Handbook of Illinois Evidence § 607.1 (7th ed. 1999) ("Credibility is dependent upon the willingness of the witness to tell the truth and upon his ability to do so.").

The Illinois supreme court, moreover, has long held that an officer or agent for a corporation is presumed to have all the authority usually incident to the services they perform. Singer Mfg. Co. v. Holdfodt, 86 Ill. 455 (1887). There can be no dispute that ROE, in fact, signed one of the returns ABC filed during the period. Department Ex. 4, p. 1. Department Exhibit 4 demonstrably contradicts the inconsistent hearing testimony that ROE had no responsibilities regarding the filing of ABC's Illinois withholding returns. Her discovery responses, moreover, contradict her testimony that she lacked the authority to prepare and mail the checks required to pay the amounts of tax shown due on ABC's withholding tax returns. *Compare* Department Ex. 12, p. 4 *with* Tr. pp. 70-74 (ROE).

ROE testified that she did not personally or willfully attempt to evade any taxes due to Illinois. Tr. p. 75. But that is not the only criteria when determining whether a person is subject to a personal liability penalty. A penalty may also be imposed where a responsible person "willfully fails to collect such tax or truthfully account for and pay over such tax" 35 **ILCS** 5/1002(d). Here, ROE conceded that she was the person who mailed ABC's invoices, checks and other correspondence. Department Ex. 12, p. 4; Tr. pp. 64, 66-69 (ROE). It is not unreasonable to conclude that she was also the person who was responsible for mailing out ABC's Illinois quarterly withholding tax returns, especially the one she personally signed, even if she only signed it because her father was

unavailable. Department Ex. 4, p. 1; Department Ex. 12, p. 4. When she knowingly mailed ABC's returns to the Department — without a check to pay the amount shown due on them — she “willfully fail[ed] to ... truthfully account for and pay over such tax” 35 **ILCS** 5/1002(d).

The more important question is whether ROE's signature on one of the quarterly returns makes her liable for the whole amount of ABC's unpaid withholding tax liability, which includes ABC's nonpayments for six quarters. *See* Department Ex. 1. The record shows that JOHN signed all of the other returns filed during the applicable period (*see* Department Ex. 4), which corroborates all of the witnesses' general testimonies that, for purposes of ABC's Illinois withholding tax liabilities, and for all purposes, JOHN was ABC's most responsible person. *See Tr. passim*. Concluding that JOHN was *more* responsible than ROE, however, does not mean that she escapes all liability. A statutory personal responsibility penalty need not be directed at only the “most responsible” officer, employee or person; “any” responsible officer, employee or person will do. 35 **ILCS** 5/1002(d); 35 **ILCS** 735/3-7; Roth v. United States, 779 F.2d 1567, 1571 (11th Cir. 1986) (“There is no dispute ... that more than one person may be a ‘responsible person’ for an employer.”). The evidence shows that: ROE was named and held out as the secretary of ABC (Department Exs. 6-7; Department Ex. 12, p. 1 (“I was an employee, Director and secretary of the Corporation.”)); ROE had the authority to sign ABC's quarterly returns during the applicable period (*see* Department Ex. 4, p. 1); and she has not rebutted any other element of the Department's *prima facie* correct determination that she was liable for the penalty.

The evidence in this case shows that when ROE signed and mailed ABC's return

for the second quarter of 1995, she must have known that she was filing that return without any payment enclosed. Department Ex. 4, p. 1. Clearly, ROE knew — at the earliest date of the period at issue — that ABC was withholding tax monies from its employees and not turning it over to the Department. *See id.* Since ROE, thereafter, prepared the ABC checks that were written to its employees and to other creditors (*see* Department Ex. 12, p. 4; Department Exs. 13-20 (ABC's bank statements)), she had actual personal knowledge that the corporation's withholding taxes were being used by the corporation for purposes other than for which they were being held in trust.

ROE argues that she could not have willfully failed to pay ABC's withholding liability because she did not have the authority to sign ABC's checks. *See* Tr. p. 83; Department Ex. 12, p. 4 (ROE's response to interrogatory no. 10). She argues that if the Department wanted to corroborate the truthfulness of the testimony that she was not named as a signatory on ABC's bank accounts, it could have subpoenaed documentation from ABC's banks. *See* Tr. pp. 83-84. ROE, however, misunderstands that *she* bears the burden to show, by credible and competent evidence that is closely identified with corporate books and records, that one of the elements for a personal responsibility penalty does not exist. Raleigh v. Illinois Department of Revenue, 120 S.Ct. at 1954; Branson, 168 Ill. 2d at 261-62, 659 N.E.2d at 968-69. The reason why the burden lies with the taxpayer is because of "... the taxpayer's readier access to the relevant information, [citations omitted] and the importance of encouraging voluntary compliance by giving taxpayers incentives to self-report and to keep adequate records in case of dispute" Raleigh, 120 S.Ct. at 1955.

Here, it should have been easy for the secretary of the corporation to obtain from

ABC's banks a copy of whatever signature card(s) had been prepared by the corporation for the bank's use. Such evidence could have corroborated the unsupported testimony — and most certainly would have, had those cards revealed that ROE was not authorized to sign checks on ABC's behalf — but those documents were never offered as evidence at hearing. *See* Tr. p. 80-81 (in the Department's closing argument, it asserted that such signature cards "... would have clearly established who was and who was not a signatory on the bank account.").

I want to stress how important it was for ROE to show, with documentary evidence closely identified with ABC's books and records, that she did not have the authority to sign ABC's checks. The factual question whether ROE had the authority to sign ABC's checks to pay, or to direct others to pay, ABC's Illinois withholding taxes was critical to whether she was a "... person required to collect, truthfully account for, and pay over the tax imposed by [the IITA]" 35 **ILCS** 5/102(d). While the trial testimony was all relatively consistent that JOHN had overriding authority over ABC's business operations, it seemed clear that, either in JOHN's absence and/or with his approval, ROE had and actually exercised the authority to conduct many of ABC's important operations. While I concede that it's possible that ABC never paid any bills while JOHN was out of town on a job, that doesn't seem like a particularly rational way to conduct a small business. Nor does this record support a conclusion that ABC could not act without JOHN's signature. For example, ABC's Illinois withholding tax returns and bankruptcy petition were filed when JOHN was unavailable to sign them. *See* Department Ex. 4, p. 1; Tr. pp. 58, 60 (ROE). Those circumstances alone strongly suggest that someone other than JOHN might have been able to sign ABC's checks, and

the seemingly logical choice would have been ROE, ABC's other corporate officer with the authority to conduct ABC's day-to-day business. What was necessary here, therefore, was some *documentary* evidence to corroborate ROE's relatively counter-intuitive claim that she, the secretary, office manager and a director of the corporation, lacked any authority to sign the checks she routinely prepared and mailed to pay ABC's ordinary expenses. *See Balla*, 96 Ill. App. 3d at 296-97, 421 N.E.2d at 239 (uncontroverted testimony that was not corroborated with documentary evidence was insufficient to show that taxpayer was entitled to claimed exemption). ABC's bank signature cards were one type of documentary evidence that could have supported ROE's claim that she could not have willfully failed to pay over such taxes, but such evidence was never produced or offered into evidence at hearing.

Other evidence that might have corroborated ROE's testimony would have been copies of ABC's checks written during the periods for which it had actually paid the Illinois income tax that had been withheld from its employees' wages. Such corporate books and records would have shown whether ROE, in fact, signed any of those checks. Alternately, copies of other ABC checks issued on or about the period at issue (which checks would show the signer's name) could have supported the testimony that ROE had no general check writing authority for ABC. But again, no such documentary evidence was offered at hearing. The bank statements that were introduced by the Department, in contrast, are not probative to show that ROE lacked the authority to sign ABC's checks, because those statements do not reflect whose signatures appear on ABC's checks. *See* Department Exs. 13-20. Instead, those statements show that ROE must have known that ABC was paying out monies to other creditors (since those amounts would be paid using

checks ROE ordinarily prepared, *see* Department Ex. 12, p. 4), after she knew that the corporation was not paying the tax monies it held in trust. Department Ex. 12, p. 3 (ROE “... was aware of the requirement for making State and Federal tax deposits”).

When asked, during closing arguments, why ABC’s signature cards for its bank accounts was not introduced at hearing, counsel for taxpayers responded, in part, by saying that such documents could not be obtained because taxpayers were not responsible officers and directors of the corporation. *See* Tr. pp. 83-84. ROE, however, appears to have complied with some of the Department’s requests for the production of ABC’s bank records. *See* Department Ex. 12, p. 5 (ROE’s response to interrogatory number 15). The Department introduced at hearing, moreover, copies of ABC’s bank records at hearing, which taxpayers obviously produced through discovery, since no subpoenas were ever requested by either party in this matter. Department Exs. 13-20.¹ Thus, counsel for ROE was just plain wrong when he argued that taxpayers did not have access to ABC’s bank records. *See* Tr. pp. 83-84. Further, there was never any evidence offered to show that ABC was not cooperating with its officers’ efforts to obtain records. The allegedly controlling person for ABC, for example, appeared as a witness without necessity of a subpoena. *See* Tr. pp. 18-39 (JOHN).

Finally, ROE argues that her hearing testimony was corroborated by documents from ABC’s accountant, which the Department introduced into evidence at hearing. Tr. p. 85; Department Ex. 22. The evidence to which counsel refers consists of two virtually identical letters from SUZIE to the Department’s Collection Service Division, each of which included a copy of the NOD the Department issued to either DOE or to ROE.

¹ As the person who would have signed any subpoena requested prior to its issuance, I take notice that no such subpoena was ever prepared regarding this matter.

Department Ex. 22. In those letters, Greico lists certain acts DOE and ROE either did not perform, or which they lacked the authority to perform. *Id.* Ordinarily, such documents would not be admissible at hearing, because the letters constitute hearsay. Hearsay admitted at an administrative hearing without objection, however, is to be given its natural probative effect. Jackson v. Bd. of Labor, 105 Ill. 2d 501, 508, 475 N.E.2d 879, 883 (1985). The fact-finder has discretion to give hearsay statements admitted without objection whatever weight he believes they are entitled. *Id.* at 509, 475 N.E.2d at 884. For the following reasons, I give the evidence no weight.

The types of documentary evidence that will ordinarily corroborate a taxpayer's credible testimony that, for whatever reason, he is not liable for a statutory penalty, are the regularly kept books and records of the corporation the taxpayer worked for, or the records others made and/or kept in the regular and ordinary course of business, regarding the corporation whose unpaid liability is at issue. 35 ILCS 5/501; *see also Preski v. Warchal Construction Co.*, 111 Ill. App. 3d 641, 649-51, 444 N.E.2d 1105, 1110-12 (1st Dist. 1982) (records not prepared by the proponent may nevertheless be admitted as business records). In this case, for example, ABC's filed returns tended to corroborate DOE's testimony that she was not a person with the authority or responsibility for signing or filing ABC's returns. Such "books and records" evidence, even though hearsay, brings with it a certain amount of trustworthiness borne from the understanding that businesses cannot long survive without accurate records. Preski, 111 Ill. App. 3d at 651, 444 N.E.2d at 1112 ("The accuracy of the records does not depend on whether its preparer is the custodian but whether they were, as here, prepared in the regular course of business under such circumstances as to call for accuracy in the making of the records.").

The letters at issue, in contrast, are clearly not the regularly kept books and records of a business. Those letters were written by ABC's accountant following the Department's issuance of the NODs at issue, and appear to have been prepared by the writer in an attempt to dissuade the Department from seeking to finalize such penalties against taxpayers. Thus, the letters are documents prepared in anticipation of litigation, which lack any inherent and objective indicia of trustworthiness.

The letters, moreover, do not set forth facts to show how the writer obtained personal knowledge of the alleged facts and conclusions that were included in those letters. For example, the letters do not indicate that Greico ever saw the signature cards ABC prepared to notify the bank of who was authorized to sign ABC's checks; yet the letter written on ROE's behalf states that she "was not a signature [*sic*] on the checking account." Department Ex. 22, p. 4. The letters, in short, contain only the unsworn, conclusory testimony of the writer. *See, e.g.*, Department Ex. 22, pp. 1, 4 ("[DOE and ROE] had no ability to direct or perform any duties for the corporation"); *see also*, Kincaid v. Ames Department Stores, Inc., 283 Ill. App. 3d 555, 571, 670 N.E.2d 1103, 1114 (1st Dist. 1996) (J. McNulty, dissenting) ("The declarant of a hearsay statement which is admitted in evidence is in effect a witness. ...") (quoting an advisory committee note to Fed. R. Evid. 806)). Since Illinois courts have regularly and long held that, without corroborating documentary evidence, a witness' sworn testimony is not sufficient to rebut the Department's prima facie case (*see, e.g.*, Goldfarb, 411 Ill. at 580, 104 N.E.2d at 609 ("... the competent testimony of the taxpayer ... *and his records* overcame the prima facie case made by the corrected return") (emphasis added); Balla, 96 Ill. App. 3d at 296-97, 421 N.E.2d at 239), there is no reason to conclude that written

unsworn statements made by an out-of-court declarant should somehow be given *more* weight than the live testimony of a witness who subjects himself to cross-examination. Finally, the statements in Greico's letters are merely cumulative of the other uncorroborated testimony that was offered at hearing. Thus, I give Greico's letters no weight whatsoever in this matter.

As a final note, Department Ex. 5 was admitted as part of the Department's sworn response to taxpayers' interrogatories. Department Ex. 5. That exhibit shows that ABC made certain tax payments, and that the Department applied such payments to ABC's unpaid withholding tax liability for the second and fourth quarters of 1995. *Id.* That evidence is inconsistent with the Department's proposed assessment of Illinois withholding tax to ROE for those quarters, in that the NOD issued to ROE states that the tax liability for those periods is \$3,531.59 and \$1,964.04 (*see* Department Ex. 1), while Department Exhibit 5 shows that the remaining liability for those periods is, in fact, \$299.02 and \$1,208.04, respectively. Department Ex. 5. Although the Department did not indicate, when its Exhibit 5 was offered into evidence, that it was being offered to show the Department's revision of the amount shown on the NODs, it has that effect. In any event, the record shows that the Department has admitted that the true amount of the tax remaining due regarding ABC's second and fourth quarters of 1995 is \$299.02 and \$1,208.04, respectively. Department Ex. 5.

Conclusion:

Following consideration of all the evidence, I recommend that the Director cancel the NOD issued to DOE, because she was not one of ABC's responsible persons. I recommend that he finalize the NOD issued to ROE pursuant to statute, but only after it

has been revised to take into account the tax payments already applied to the quarterly periods at issue. *See* Department Ex. 5.

8/14/00
Date

Administrative Law Judge